2014 IL App (5th) 120332-U

NO. 5-12-0332

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

TINA M.F. GINGRICH, P.C.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Madison County.
	)	
v.	)	No. 07-L-206
	)	
CHRISTINA L. MIDKIFF, M.D.,	)	Honorable
	)	William A. Mudge,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Spomer and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly entered summary judgment in the defendant's favor because the law-of-the-case doctrine did not preclude the defendant's contract construction arguments and because the plain language of the contract rendered the noncompetition clause in the contract inapplicable to the defendant.

¶ 2 The plaintiff, Tina M.F. Gingrich, M.D., P.C. (Gingrich PC), an Illinois corporation providing obstetrical and gynecological (ob-gyn) medical services, filed a breach-of-contract action against the defendant, Christina L. Midkiff, M.D., in the circuit court of Madison County. The circuit court entered summary judgment in Dr. Midkiff's favor. On appeal, Gingrich PC argues that the circuit court erred in entering summary judgment because the law-of-the-case doctrine barred Dr. Midkiff's contract construction arguments raised below and because the noncompete provision in the parties' agreement should not have been construed in Dr. Midkiff's favor as a matter of law. We affirm.

¶ 3 BACKGROUND

¶ 4 Dr. Gingrich incorporated her ob-gyn practice as Gingrich PC, which operated thereafter under the name Maryville Women's Center. Subsequently, Dr. Gingrich hired Dr. Marlene H. Freeman and Dr. Midkiff. On October 1, 1999, the three entered into a stock purchase agreement (the Agreement), wherein Dr. Freeman and Dr. Midkiff agreed to purchase stock and become, along with Dr. Gingrich, shareholders of Gingrich PC.

¶ 5 Section F of the Agreement, labeled "CHANGES AND TERMINATION OF THE PARTNERSHIP," states as follows:

> "1. Amendments. ***
>
> 2. Withdrawal of Shareholder. Any shareholder may elect to withdraw from the corporation upon giving six months notice in writing and on the expiration of said six month period, the withdrawal will be effective.
>
> 3. Distribution to Withdrawing Shareholder. If any Shareholder elects to withdraw from this corporation, she shall be entitled to profits as defined in Paragraph 2, Part D of this agreement. The withdrawing Shareholder's distribution is payable in a lump sum or over a ten year period or less, which will be determined by the remaining shareholders. ***
>
> 4. Covenant Not To Compete. Shareholders agree not to engage in the practice of medicine[,] nor advertise to practice medicine, for a period of five (5) years from the date of such termination, within a twenty (20) miles radius of Oliver C. Anderson Hospital in Maryville, Illinois, and St. Joseph's Hospital in Highland, Illinois, not to include the state of Missouri. An exception shall be made for Christina L. Midkiff, M.D.[,] to allow her to practice in hospitals in *** Alton, Illinois[,] if she leaves. Shareholders shall not take the name, vital information, records[,] or charts of patients, nor contact patients, seen in the corporation's practice. It is understood

by the shareholders that it would be difficult[ ] if not impossible to adequately compensate the corporation for damages the corporation would suffer as a result of the violation of this Non Compete. It is agreed that shareholders shall be entitled to specific performance of this covenant[ ] and that the Shareholder will be responsible for the payment of court costs and reasonable attorney's fees incurred by the corporation or by the remaining shareholders in enforcing this agreement, if such a violation occurs. All Shareholders have voluntarily entered into this Non-competition agreement and ha[ve] had the opportunity to seek advice of counsel.

5. Death or Disability of Shareholder. ***

***

6. Retirement. ***

7. Dissolution of Corporation. ***

8. Expulsion of Shareholder. A Shareholder will be expelled from the corporation for one or more of the following reasons:

- unable to practice medicine, or loss of license in the state of Illinois

- conviction of a felony

- Performs an unethical act as set out by the 150th Anniversary edition of the AMA's Code of Medical Ethics. ***

To expel a shareholder for any other reason, the remaining shareholders must vote unanimously to do so. *** The expelled Shareholder does not have the right to any of the patient files acquired during their partnership, and must adhere to the Non-Compete clause in Section F(4)."

¶ 6 Under the agreement, all three became equal owners of the corporation; however, the Agreement gave Dr. Gingrich veto power. This resulted in a deadlock in 2001. As a result of the disputes that arose between the physicians, Dr. Midkiff and Dr. Freeman filed a

four-count complaint against Dr. Gingrich and Gingrich PC in March 2002. The complaint sought declaratory and injunctive relief relating to the operation of the ob-gyn practice, relief provided to shareholders of nonpublic corporations pursuant to the Illinois Business Corporation Act of 1983 (the Act) (805 ILCS 5/12.56 (West 2002)), actual and punitive damages for a breach of fiduciary duty, and a declaratory judgment that the noncompetition clause contained in the Agreement was unenforceable. In this action (Gingrich I), Dr. Gingrich and Gingrich PC included in their initial pleadings a competing request for a declaratory judgment that the Agreement's covenant not to compete was valid and enforceable.

¶ 7 On May 29, 2002, Dr. Gingrich filed a notice of election pursuant to section 12.56(f) of the Act (805 ILCS 5/12.56(f) (West 2002)) to purchase the shares of Drs. Midkiff and Freeman. On January 15, 2003, the court entered a written order certifying questions for appeal. On appeal, this court reversed the order of the circuit court striking Dr. Gingrich's notice of election to purchase shares, finding that Dr. Gingrich's notice of election complied with the requirements of the Act. See *Midkiff v. Gingrich*, 355 Ill. App. 3d 857 (2005). We further remanded the cause for the court to clarify the basis of its ruling staying only the claims involving section 12.56 of the Act. See *id.*

¶ 8 After remand, on January 25, 2007, the circuit court entered an order pursuant to the Act addressing the valuation of the stock, certain credits and debits sought by the parties, and whether the terms of the buyout should include a statutory noncompetition restriction. Noting that the action was not based in contract and that it was therefore not bound by the Agreement, the court, although utilizing the valuation formula in the Agreement, declined to impose a restrictive covenant upon Dr. Midkiff as part of the stock purchase.

¶ 9 During the pendency of Gingrich I, and following the decision entered on January 25, 2007, Dr. Gingrich and Dr. Midkiff practiced in different offices located in Maryville,

Illinois. On March 5, 2007, Gingrich PC commenced this action (Gingrich II) by filing a complaint for a breach of contract against Dr. Midkiff. Gingrich PC alleged that since January 2007, when the parties' corporate ties had ceased pursuant to the circuit court's order, Dr. Midkiff had improperly engaged in the practice of medicine and advertised her medical practice in Maryville, Illinois, in violation of the parties' contractual noncompetition covenant in the Agreement. On April 23, 2007, Dr. Midkiff filed a motion to dismiss and request for sanctions, alleging that Gingrich PC's breach-of-contract complaint was barred by the doctrine of *res judicata*. On July 19, 2007, the circuit court granted Dr. Midkiff's motion to dismiss, concluding that collateral estoppel prevented Dr. Gingrich from raising the covenant not to compete issue.

¶ 10 On appeal, we reversed and remanded. See *Gingrich v. Midkiff*, No. 5-08-0359 (2010) (unpublished order under Supreme Court Rule 23). We found the doctrine of *res judicata* inapplicable because the claims in Gingrich I and II were separate and distinct and because the court in Gingrich I, which was filed pursuant to the Act (805 ILCS 5/12.56 (West 2002)), expressly reserved Gingrich PC's right to maintain the breach-of-contract action in Gingrich II. See *id*. On appeal, this court did not address the language of the Agreement or the enforceability of the noncompete clause in the Agreement. See *id.* This court "merely conclude[d] that Gingrich PC's breach-of-contract action *** was not barred by res judicata or collateral estoppel." *Id.*

¶ 11 After remand, the circuit court entered an order on July 6, 2012, granting a motion for summary judgment filed by Dr. Midkiff. Construing the plain language of the Agreement, the circuit court determined that the Agreement triggered the covenant-not-to-compete clause only when a shareholder voluntary withdrew or was expelled. The court held that because Gingrich PC elected to purchase Dr. Midkiff's stock pursuant to the procedures in the Act (805 ILCS 5/12.56(f) (West 2002)), Dr. Midkiff neither withdrew nor was she expelled as

provided in the Agreement. The circuit court thereby concluded that the noncompete provision did not apply to Dr. Midkiff, and therefore, she did not violate its restrictions. Gingrich PC filed its timely appeal.

¶ 12 ANALYSIS

¶ 13 Gingrich PC argues that Dr. Midkiff should be barred by the law-of-the-case doctrine from arguing that the language of the covenant not to compete did not encompass the circumstances of her corporate exit and therefore did not apply to her because she failed to assert it during previous proceedings.

¶ 14 The law-of-the-case doctrine precludes relitigation of an issue previously decided in the same case. *Krautsack v. Anderson*, 223 Ill. 2d 541, 552 (2006). This doctrine applies to both issues of law and issues of fact. *Bjork v. Draper*, 404 Ill. App. 3d 493, 501 (2010). Questions decided on a previous appeal are binding on the trial court on remand as well as on the appellate court on a subsequent appeal. *Norris v. National Union Fire Insurance Co. of Pittsburgh*, 368 Ill. App. 3d 576, 580 (2006). The doctrine's purposes are to avoid indefinite relitigation of the same issues and to ensure that consistent results are obtained in the same litigation. *In re Christopher K.*, 217 Ill. 2d 348, 365 (2005). "However, the doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided; it is not a limit on their power.' " *Norris*, 368 Ill. App. 3d at 580 (quoting *People v. Patterson*, 154 Ill. 2d 414, 468 (1992)). Whether Dr. Midkiff's contractual arguments were barred by the law-of-the-case doctrine presents a question of law. *In re Christopher K.*, 217 Ill. 2d at 363-64. "Therefore, we review it *de novo*." *Id*.

¶ 15 In the 2005 appeal to this court, we determined that Dr. Gingrich's notice of election to purchase shares was sufficient pursuant to the Act and directed the court to clarify the basis of its stay. See *Midkiff*, 355 Ill. App. 3d 857. In the 2010 appeal to this court, we reviewed the lower court's order granting a motion to dismiss pursuant to section 2-619(a)(4)

of the Code of Civil Procedure, which states that a defendant may file a motion to dismiss on the basis that the cause of action was barred by a prior judgment (735 ILCS 5/2-619(a)(4) (West 2006)). *Gingrich*, No. 5-08-0359. The sole issue was whether the circuit court erred in dismissing Gingrich PC's breach-of-contract complaint under the theories of *res judicata* and collateral estoppel based on the circuit court's prior judgment entered pursuant to the Act. *Id.* We concluded that Gingrich PC's contract claim was not barred based upon the prior litigation between the parties. *Id.* At no time did we analyze the language of the Agreement in our appellate court orders. The underlying merits of Gingrich PC's breach-of-contract action were not before this court.

¶ 16 Accordingly, we find that Dr. Midkiff's argument, that the noncompete provision of the Agreement does not apply to her because of the forced buyout under section 12.56 of the Act (805 ILCS 5/12.56(f) (West 2002)), involves the construction of the Agreement, which was not raised, nor required to be raised, in the prior appeals. Because the construction of the noncompete clause of the Agreement is before this court for review for the first time, the law-of-the-case doctrine is inapplicable. See *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 59 ("While questions of law actually decided in a previous appeal are binding, the merits of the controversy not decided by the reviewing court do not become the law of the case.") We therefore disagree with Gingrich PC that the law-of-the-case doctrine precludes this court or the circuit court from analyzing and construing the language of the Agreement to determine the viability of Gingrich PC's breach-of-contract action.

¶ 17 In support of its position, Gingrich PC cites *Martin v. Federal Life Insurance Co.*, 164 Ill. App. 3d 820, 825-26 (1987) (*Martin II*). In *Martin v. Federal Life Insurance Co.*, 109 Ill. App. 3d 596, 599 (1982) (*Martin I*), the plaintiff filed a three-count complaint against his employer, alleging breach of an oral contract and estoppel, breach of implied covenant of good faith and fair dealing, and tortious interference of breach of contract. *Id.* at 598. The

employer moved to dismiss the complaint, arguing that the employment relationship was at-will and, alternatively, that the statute of frauds barred an oral contract for permanent employment. *Id.* at 599. The trial court granted the employer's motion, and the appellate court reversed, finding that the statute of frauds did not bar the alleged oral contract and that the plaintiff had sufficiently stated a valid cause of action for breach of an oral contract. *Id.* at 601-02.

¶ 18 Upon remand in *Martin*, the defendant moved for summary judgment, arguing for the first time that a provision of the Insurance Code barred employment contracts between insurance companies and employees that extended beyond three years. *Martin II*, 164 Ill. App. 3d at 822-23. The trial court granted the employer's motion, and the plaintiff appealed, arguing that there was no evidence suggesting he was ever aware of the insurance provision. *Id.* at 823. The appellate court concluded that it had already decided that the plaintiff stated a valid claim for a breach of an oral contract, and the employer was obligated to raise the Insurance Code provision at that time. *Id.* at 824-25. Accordingly, the appellate court concluded that the law-of-the-case doctrine prevented it from reconsidering whether the Insurance Code voided the agreement between the parties. *Id.* at 826.

¶ 19 Unlike *Martin*, in which the court had previously decided that the plaintiff had stated a valid breach of an oral contract claim, no court in this case previously determined that Gingrich PC stated a valid breach-of-contract claim. We determined only that Dr. Gingrich had filed a sufficient notice of election to purchase stock pursuant to the Act (*Midkiff v. Gingrich*, 355 Ill. App. 3d 857 (2005)) and that Gingrich PC's breach-of-contract claim was not barred by *res judicata* or collateral estoppel (*Gingrich v. Midkiff*, No. 5-08-0359 (2010)). We therefore find *Martin* distinguishable. Accordingly, we reject Gingrich PC's claim that the law-of-the-case doctrine precludes Dr. Midkiff from arguing that the plain language of the Agreement does not prohibit her nearby practice because she neither withdrew nor was

expelled from the corporation.

¶ 20 Gingrich PC next argues that the circuit court erred in holding that the contractual noncompete provision did not apply to Dr. Midkiff. Dr. Midkiff counters that the circuit court correctly entered summary judgment in her favor because she did not breach the Agreement. Specifically, Dr. Midkiff counters that the noncompete clause in section F(4) of the Agreement did not apply to the method of shareholder separation that occurred–a forced shareholder buyout pursuant to section 12.56(f) of the Act (805 ILCS 5/12.56(f) (West 2002)). Dr. Midkiff argues that the noncompete limitations provided for in the Agreement apply to two situations specifically described in the agreement: (1) the election by a shareholder to withdraw from the corporation followed by an effective withdrawal six months thereafter, as outlined in subsection F(2); and (2) the expulsion of a shareholder pursuant to the procedures outlined in subsection F(8). We agree.

¶ 21 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2006). Although summary judgment is an efficient and useful aid in the expeditious disposition of a lawsuit, it is a drastic measure that should only be employed if the right of the moving party is clear and free from doubt. *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 31 (2005). Review of an entry of summary judgment is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 22 "The interpretation of a contract is a question of law and therefore may be decided on a motion for summary judgment." *Joyce v. Mastri*, 371 Ill. App. 3d 64, 74 (2007). "When interpreting a contract, we must consider the entire document to give effect to the parties' intent, as determined by the plain and ordinary meaning of the language of the contract." *Id.*

"[T]o discover this intent the various contract provisions must be viewed as a whole." *Lempa v. Finkel*, 278 Ill. App. 3d 417, 428 (1996). "Words derive meaning from their context, and contracts must be viewed as a whole by examining each part in light of the other parts." *Id.* "Contract language must not be rejected as meaningless or surplusage, and it is presumed that the terms and provisions of a contract are purposely inserted and that the language was not employed idly." *Id.*

¶ 23 "[I]f the contract terms are unambiguous, the parties' intent must be ascertained exclusively from the express language of the contract [citation], giving the words used their common and generally accepted meaning." *Shields Pork Plus, Inc. v. Swiss Valley Ag Service*, 329 Ill. App. 3d 305, 310 (2002). A contract is ambiguous if "the language used is susceptible to more than one meaning [citation] or is obscure in meaning through indefiniteness of expression." (Internal quotation marks omitted.) *Id.* Ambiguity is not presumed from the parties' disagreement over the contract's meaning; rather, it must be apparent from the language itself. *Id.*

¶ 24 "Whether a noncompetition clause is enforceable is a question of law." *Bishop v. Lakeland Animal Hospital, P.C.*, 268 Ill. App. 3d 114, 117 (1994). "Illinois courts favor fair competition and disfavor restraints of trade." *Id.* "Therefore, noncompetition clauses are closely scrutinized." *Id.* "Historically, covenants restricting the performance of medical professional services have been held valid and enforceable in Illinois as long as their durational and geographic scope are not unreasonable, taking into consideration the effect on the public and any undue hardship on the parties to the agreement." *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 67 (2006).

¶ 25 The "General Provisions" section of the Agreement, located in Part A, provides that the corporation would commence and continue "until a terminating event, as described in Part F of this Agreement." Part F's provisions provide for the withdrawal of a shareholder,

upon giving six months' notice in writing, and the expulsion of a shareholder who is unable to practice medicine, is convicted of a felony, or performs an unethical act.

¶ 26 Specifically, section F of the Agreement provides as follows:

> "F. CHANGES AND TERMINATION OF THE PARTNERSHIP
>
> ***
>
> 2. Withdrawal of Shareholder. Any shareholder may elect to withdraw from the corporation upon giving six months notice in writing and on the expiration of said six month period, the withdrawal will be effective.
>
> 3. Distribution to Withdrawing Shareholder. If any Shareholder elects to withdraw from this corporation, she shall be entitled to profits as defined in Paragraph 2, Part D of this agreement. The withdrawing Shareholder's distribution is payable in a lump sum or over a ten year period or less, which will be determined by the remaining shareholders. ***
>
> 4. Covenant Not To Compete. Shareholders agree not to engage in the practice of medicine[,] nor advertise to practice medicine, for a period of five (5) years from the date of such termination, within a twenty (20) miles radius of Oliver C. Anderson Hospital in Maryville, Illinois, and St. Joseph's Hospital in Highland, Illinois, not to include the state of Missouri. An exception shall be made for Christina L. Midkiff, M.D.[,] to allow her to practice in hospitals in *** Alton, Illinois[,] if she leaves. Shareholders shall not take the name, vital information, records[,] or charts of patients, nor contact patients, seen in the corporation's practice."

¶ 27 In subsection F(4), the shareholders agreed not to compete for a period of five years "from the date of such termination." "Such termination" refers to the shareholder's withdrawal as described in subsection F(2) and referenced in F(3), which allows any shareholder to withdraw from the corporation upon giving six months' notice in writing. See

Freeman United Coal Mining Co. v. Industrial Com'n, 308 Ill. App. 3d 578, 582 (1999) ("Such pathologist" refers to the pathologist appointed by the Commission in previous paragraph). Thus, the plain language of section F(4), read in concert with sections F(2) and F(3), reveals that the covenant not to compete was intended to be triggered by the shareholder's election to withdraw from the corporation pursuant to the procedures of section F(2). See *Joyce*, 371 Ill. App. 3d at 74 (various contract provisions must be viewed as a whole).

¶ 28 As noted by circuit court, this reading is bolstered by the plain language of subsection F(8), which is entitled "Expulsion of Shareholder," and provides grounds and procedures for expelling a shareholder. This section provides that an expelled shareholder "must adhere to the Non-Compete clause in Section F(4)." Subsection F(8)'s language implies that, without its last sentence, an expelled shareholder would not be bound by the noncompete clause of F(4). If the noncompetition clause in subsection F(4) applied to every method by which a shareholder separated from the corporation, the last sentence of subsection F(8) involving expulsion would be meaningless and surplusage. See *Smith v. Burkitt*, 342 Ill. App. 3d 365, 370 (2003) ("A court is not to interpret an agreement in a way that would nullify any of the provisions in the agreement or render them meaningless."). Thus, we agree with Dr. Midkiff and the circuit court that the plain language of the Agreement reveals the parties' intent to limit the applicability of the noncompete clause to a voluntary withdrawal pursuant to subsection F(2) or shareholder expulsion pursuant to subsection F(8).

¶ 29 In this case, Dr. Midkiff did not elect to withdraw pursuant to subsection F(2), nor was she expelled as a shareholder pursuant to subsection F(8) of the Agreement. Initially, Dr. Midkiff brought her action pursuant to section 12.56 of the Act, which allows shareholders to seek relief when a corporation's directors are deadlocked or have acted illegally or the corporation assets are being misapplied. See 805 ILCS 5/12.56(a) (West 2002). Pursuant

to the Act, Dr. Gingrich elected to purchase the shares owned by Dr. Midkiff. See 805 ILCS 5/12.56(f) (West 2002); *Jahn v. Kinderman*, 351 Ill. App. 3d 15, 16 (2004) (the Act provides that in the event of a petition for relief, the corporation or one or more of its shareholders may elect to purchase all the shares of the petitioning minority and that the court is to determine the fair value of the shares and the other terms of the purchase if the parties are unable to agree on those parameters). Because the parties were unable to reach an agreement on the fair value and the terms for the purchase of Dr. Midkiff's shares, the court was required to determine the fair value of the shares and specify the attendant conditions imposed pursuant to section 12.56 of the Act (805 ILCS 5/12.56 (West 2002)). Because Dr. Midkiff did not make an election to withdraw pursuant to subsection F(2) of the Agreement, nor was she expelled as a shareholder pursuant to subsection F(8) of the Agreement, the circuit court properly concluded that, pursuant to the plain language of the agreement, the noncompete clause in subsection F(4) was not triggered and did not apply to prevent Dr. Midkiff's nearby practice. Accordingly, the circuit court properly entered summary judgment in favor of Dr. Midkiff.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 32 Affirmed.